STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Doctoroff, P.J. and Holbrook, Jr. and Hoekstra, J.J.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
Docket No. 120157

v.

Court of Appeals
No. 215576

WILLIAM C. McGEE,

Defendant-Appellant.
/

Oakland County Circuit Court 98-159206-FH,
98-159207-FH, 98-159213-FH, and 98-159214-FH
/

BRIEF ON APPEAL--DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction pursuant to its granting of delayed applications (each party filed an application) on December 10, 2002 (47a). Defendant-Appellant appealed his convictions and sentences imposed in the Oakland County Circuit Court to the Court of Appeals, which in a published opinion [247 Mich. App. 325; 636 N. W. 2d 531 (2001)] dated August 31, 2001, reversed the convictions and remanded for a new trial. (33a).

QUESTIONS PRESENTED

I.

WAS THE TRIAL COURT'S SUA SPONTE DECLARATION OF A MISTRIAL BASED UPON MANIFEST NECESSITY?

Defendant-Appellant answers "no"

Plaintiff-Appellee would answers "yes"

The Court of Appeals answered this question "no"

II.

WAS THE TRIAL COURT'S RECALLING AND REPOLLING OF THE JURORS SUBJECT TO HARMLESS ERROR ANALYSIS?

Defendant-Appellant answers "no"

Plaintiff-Appellee would answer "yes"

The Court of Appeals answered this question "no"

III.

a) ARE MR. MCGEE'S DOUBLE JEOPARDY PROTECTIONS IMPLICATED IN THIS CASE, AND, IF SO, b) IS A HARMLESS-ERROR ANALYSIS APPLICABLE?

Defendant-Appellant answers a) "yes" and b) "no"

Plaintiff-Appellee would answer a) "no" and b) "yes"

The Court of Appeals answered a) "no"

STATEMENT OF FACTS AND PROCEEDINGS

William C. McGee, the defendant-appellant, was charged with two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), one count of delivery of an imitation controlled substance, MCL 333.7341(3), and one count of delivery of more than 50, but less than 225 grams of cociane, MCL 333.7401(2)(a)(iii). A trial by jury was conducted in the Oakland County Circuit Court, with the Honorable Jessica R. Cooper, (then) Circuit Judge, presiding.

Most of the factual issues at trial actually were not in dispute; the defense was entrapment. The testimony reflected a series of four undercover purchases, occurring between January, 1998 and March 30, 1998, when Mr. McGee was arrested and subsequently charged.

Following the jury instructions the alternate juror was selected and excused (61a). The jury subsequently returned to the courtroom at 11:59 a.m., where an oral verdict (guilty as to each of the four counts) was pronounced by the foreman (62a). Defense counsel requested that the jury be polled and the trial court began the polling, only to discover the alternate juror still present, as reflected by the following:

> THE COURT: And do you wish the jury panel polled?
>
> MR. FRIEDMAN (defense counsel): I do.
>
> THE COURT: Thank you. In finding the defendant guilty on all four counts, juror number two, was that and is that your verdict?

JUROR NUMBER TWO: Yes.

THE COURT: Juror number three, was that and is that your --why is there another juror here?

JUROR NUMBER SIX: I'm the alternate.

THE COURT: Did you go into the jury room?

JUROR NUMBER SIX: Yes.

THE COURT: Why did you go into the jury room?

JUROR NUMBER SIX: I was not instructed to do anything different.

THE COURT: Did you hear me dismiss you from the jury?

JUROR NUMBER SIX: I did.

THE COURT: You did.

(Conference at bench held off record)

THE COURT: Thank you, members of the jury. I appreciate your time and consideration and we will officially release you from jury service. Thank you.

(Jury leaves courtroom about 12:02 p.m.) (63a).

The trial court then declared a mistrial, and indicated that a re-trial would commence the following morning (64a). The following morning the trial court indicated that it had rsearched the issue and concluded that it could re-summon the jury, complete the polling, and reinstate the verdict (68a). The court rejected a double jeopardy argument raised by counsel (69a-79a). The jurors returned the following week, were polled, and the trial then accepted the verdict, as indicated by the following:

THE COURT: Now then, the polling having been completed, and all the jurors having indicated what the forman indicated on the original verdict, I formally find the defendant, the jury has found the defendant guilty on all four of those files and on all four of those counts. (97a).

Mr. McGee was thereafter sentenced, following which he appealed of right to the Court of Appeals. On August 31, 2001 the Court of Appeals reversed the convictions and ordered a new trial (33a). Both parties filed delayed applications for leave to appeal to this Court. This Court granted leave on both applications on December 10, 2002 (47a).

ARGUMENT

I. THE TRIAL COURT'S SUA SPONTE DECLARATION OF A MISTRIAL WAS NOT BASED UPON MANIFEST NECESSITY, OR CONSENT, AND WAS, THEREFORE, AN ABUSE OF DISCRETION.

A. Standard of Review

Generally, it may be said that a trial court's granting of a mistrial is reviewed for an abuse of discretion. *People v. Blackburn*, 94 Mich. App. 711; 290 N.W. 2d 61 (1980); *People v. Ortiz-Kehoe*, 237 Mich. App. 508, 573; 603 N.W. 2d 802 (1999); however, the standard of review "varies according to the issues involved". *United States v. Stevens*, 177 F. 3d. 579, 583 (1999).

B. Background

The Court of Appeals analyzed four primary decisions of the trial court: (a) the sua sponte declaration of a mistrial, (b) the revocation of the mistrial, (c) the recall and repolling of the jury, and (d) the reinstatement of the verdict. The Court of Appeals found an abuse of discretion in the declaration of the mistrial, due to the absence of manifest necessity. The Court of Appeals further found that the trial court was within its discretion pursuant to MCR 6.435(B) to vacate its declaration of the mistrial, in that no judgment had issued (the trial court similarly found it had issued no written order declaring a mistrial, so it had not "spoken" in that regard (37a-39a). The Court of Appeals further determined the trial court was without authority to recall the jury for the purpose of continuing the polling (39a). Finally, the Court of Appeals found the trial

court erred as a matter of law when it attempted to reinstate the verdict, for there was no valid and final verdict to reinstate (40a). The Court of Appeals ultimately determined, however, that two "obvious procedural errors" [i.e., the trial court's post-mistrial attempts to correct its errors] in the trial constituted manifest necessity so as to justify a mistrial and retrial (41a).

Both parties filed delayed applications for leave to appeal, which this Court granted in its December 10, 2002 Order. This Court directed the parties to include among the issues the following: (1) whether the trial court's declaration of a mistrial was based upon manifest necessity; (2) whether the alleged error or repolling the jury and reinstating the guilty verdict is subject to harmless error analysis and, if so, whether the alleged error was harmless; and (3) whether the constitutional protection against double jeopardy is implicated in this case and, if so, whether a harmless error analysis is applicable.

An accused is placed in jeopardy, that is, jeopardy "attaches", when a jury is sworn. *People v. Barker*, 60 Mich. 277; 27 N.W. 539 (1886) The Double Jeopardy Clause of the United States Constitution, Amendment V, applicable to the states through the Fourteenth Amendment (*Benton v. Maryland*, 395 U.S. 784; 89 S. Ct. 2056; 23 L. Ed. 2d 707 (1969)), and the Michigan Constitution, article 1, section 15, prohibit a defendant from twice being placed in jeopardy, that is, twice punished or twice tried, for the same offense. *People v. Dawson*, 431 Mich. 234, 250; 427 N.W. 2d 886 (1988); *Price v.*

Georgia, 398 U.S. 323, 326; 90 S. Ct. 1757; 26 L. Ed. 2d 300 (1970). However, not all retrials are barred; where the defendant consents to a mistrial or where there is a "manifest necessity" for the mistrial, retrial may be permitted. *Dawson*, 431 Mich. at 252-253; *People v. Mehall*, 454 Mich. 1, 4; 557 N.W. 2d 110 (1997); *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580; 6 L. Ed. 165 (1824); *United States v. Dinitz*, 424 U.S. 600, 607; 96 S. Ct. 1075; 47 L. Ed. 2d 267 (1976); *United States v. Gantley*, 172 F. 3d 422, 427 (6th Cir. 1999); MCR 6.420(C).

C. Manifest Necessity

Manifest necessity was recognized in *Perez*, wherein the United States Supreme Court held that a trial court has the authority to "discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated", and recognized that a trial court must "exercise a sound discretion on the subject" (*Perez*, 22 U.S. at 580). Additionally, in *United States v. Jorn*, 400 U.S. 470; 91 S. Ct.. 547; 27 L. Ed.. 2d 543 (1977), the United States Supreme Court held that the *Perez* doctrine "stands as a command to trial judges not to foreclose the defendant's option until **a scrupulous exercise of judicial discretion** leads to the conclusion that the ends of justice would not be served by a continuation of the proceedings." *Jorn*, 400 US at 485 (emphasis supplied); *Dinitz*, 424 U.S. at 607.

Manifest necessity is not rigidly defined; rather, it refers to "the existence of

sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible". *People v. Echavarria*, 233 Mich. App. 356, 363; 592 N.W. 2d 737 (1999), quoting *People v. Rutherford*, 208 Mich. App. 198, 202; 526 N.W. 2d 620 (1994). Further, a mistrial may properly be declared where "an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error." *Illinois v. Somerville*, 410 U.S. 458, 464; 93 S Ct. 1066; 35 L. Ed. 2d 425 (1973);

A trial court is accorded great deference in its decision concerning a mistrial. *Arizona v. Washington*, 434 U.S. 497, 510; 98 S. Ct. 824; 54 L. Ed. 2d 717 (1978); *People v. Lett*, 466 Mich. 206, 213, 220, and FN 12; 644 N.W. 2d 743 (2002); *People v. Johnson*, 396 Mich. 424, 437; 240 N.W. 2d 729 (1976). Accordingly, a reviewing court may not simply substitute its own judgment as to whether manifest necessity exists, but must review the trial court's decision for an abuse of discretion in finding manifest necessity. *Lett*, 466 Mich. at 220. Such deference by the reviewing court may minimize the danger that a trial judge would "employ coercive means" to secure a verdict from an otherwise hung-jury, for example. *Washington*, 434 U.S. at 509; *Stevens*, 177 F. 3d at 583.

This Court recognized "differing levels" of appellate scrutiny applicable to a trial court's decision to declare a mistrial, noting that at one end of the spectrum a trial judge's decision will be "strictly scrutinized" (for example, where declared due to the unavailability of crucial prosecution evidence or where the prosecution seeks to gain an

unfair advantage), while at the other end of the spectrum the trial judge's decision will be afforded great deference (for example, where discharging a deadlocked jury). *Lett*, 466 Mich. at 218-219; see, also, *Washington*, 434 U.S. at 510). "The appropriate standard of review is determined by whether the underlying reasons for the mistrial concern issues best left to the informed discretion of the trial judge or issues that resemble pure questions of law for which closer appellate review is appropriate". *Stevens*, 177 F. 3d. at 583 (wherein the court held double jeopardy barred reprosecution after an unavailable witness left the prosecution with insufficient evidence to support a conviction). The instant case -- involving a lingering thirteenth juror, present during but not participating in deliberations -- falls at the first-described end of the spectrum; that is, the Trial Court's declaration of a mistrial must be strictly scrutinized as a question of law, then found to have been an abuse of discretion, unsupported by manifest necessity.

Two cases are helpful in the determination of whether or not the presence of the thirteenth, non-participating juror, constituted manifest necessity, or even a plain error affecting substantial rights. In *People v. Sizemore*, 69 Mich. App. 672, 679; 245 N.W. 2d 159 (1976), the Court of Appeals remanded the case for a determination of the factual issue of whether or not thirteen jurors had deliberated the verdict; the Court held that if thirteen had rendered the verdict, the defendant would be entitled to a reversal. The implication is that if the thirteen had not rendered the verdict, regardless of the presence of the additional juror (as in the instant case), there would be no entitlement to a reversal.

The presence of a thirteenth juror was also addressed in *United States v. Olano*, 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993). The *Olano* case involved two alternates, one of whom was subsequently excused, being sent into deliberations; however, the alternates were instructed not to participate; no objection was raised, and a "plain error" [pursuant to Federal Rule of Criminal Procedure 52(b)[1]] analysis was subsequently utilized by the Ninth Circuit Court, which ultimately held as there was explicit consent from the defendant, the presence of the alternates was error; the Circuit Court then held that the presence of the alternates was "inherently prejudicial" and reversible per se. *United States v. Olano*, 934 F. 2d 1425, 1438 (1991).

The United States Supreme Court noted in construing FRCP 52(b), that the initial question is whether there was an error, then whether the error was plain, then whether the error affected substantial rights; to affect substantial rights the error must be prejudicial; that is, the error must have affected the outcome of the proceedings. *Olano*, 507 U.S. at 734. The Court further noted that a deviation from a legal rule is an error unless the rule has been waived. *Olano*, 507 U.S. at 732-733. The Court found that the presence of the alternates was a deviation from a rule, and therefore assumed it was a "plain error". The Court recognized that while the presence of alternate jurors during deliberations in theory

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[1]FRCP 52 provides: (a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

might prejudice a defendant, there was no showing of actual prejudice in the case. *Olano*, 507 U.S. at 739-740. The Court noted that the alternates had also taken the jurors oath, received the admonishments of the trial court, and were expressly advised not to participate in deliberations, and held that the Circuit Court of Appeals should not have assumed the alternates contravened the oath and instructions. *Olano*, 507 U.S. at 740.

There are glaring and relevant differences between *Olano* and the instant case. Initially, it must be stressed that the issue involved here arises from the trial court's sua sponte mistrial declaration. The presence of the thirteenth juror did not affect the outcome of the proceedings; rather, it was the trial court's immediate sua sponte declaration of mistrial that affected Mr. McGee's substantial rights. Next, the *Olano* jury reached a verdict, and the lawyers there did not raise a timely object; thus, on appeal the issue was reviewed for a plain-error affecting substantial rights. Had Mr. McGee's jury been allowed to complete a verdict, his appellate situation likely would be more closely analogous to that in *Olano*. However, we do not properly reach that level as the fundamental issue herein is the propriety of the trial court's having terminated the trial without consent, and without manifest necessity. As the *Olano* Court recognized [citing *Arizona v. Fulminante*, 499 U.S. 279, 310; 111 S. Ct. 1246; 113 L. Ed. 2d 302 (1991)], "constitutional error may not be found harmless if error deprives [the] defendant of the "'basic protections [without which] a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be

regarded as fundamentally fair'"'"(internal citation omitted).

The Court of Appeals below erred in finding "two obvious procedural errors mandating reversal: the repolling of a discharged jury and the reinstatement of an invalid verdict". *People v. McGee*, 247 Mich. App. 325, 342; 636 N.W. 2d 531 (2001)(41a). The Court's opinion overlooks the obvious: the trial had ended prematurely due to the sua sponte declaration of mistrial, declared without manifest necessity or consent. The Court's reliance upon the "obvious procedural error in the trial" exception [as cited from *Echavarria*, 233 Mich. App. at 363, and *Somerville*, 410 U.S. at 464] is manifestly erroneous. The trial court's subsequent realization that the (non-deliberating) presence of the thirteenth juror was not manifest necessity came too late to correct the damage done by the mistrial declaration. The "obvious procedural errors" simply did not occur in the trial; rather, they occurred one on the following day, the other one week later. The damage had already been done. "If the trial is concluded prematurely, a retrial for that offense is barred unless the defendant consented to the interruption or **a mistrial was declared because of manifest necessity**." *Mehall*, 454 Mich. at 4 (emphasis supplied).

The mistrial, **when declared**, and not at some subsequent point in time, must have been due to manifest necessity or with the consent of the defendant, in order to avoid the protections of double jeopardy. The Court of Appeals' on this point is manifestly erroneous, as there was no existing trial at the time of the two "obvious procedural errors" from which manifest necessity -- so as to overcome Mr. McGee's double jeopardy

protections and allow retrial -- might reasonably be found. *Somerville*, 410 U.S. at 464.

D. Consent

Consent to a mistrial acts as a waiver of a double jeopardy claim. *Echavarria*, 233 Mich. App. at 365(where the Court of Appeals found consent through defense counsel's refusal to continue the trial, even though counsel expressly objected to a mistrial); *People v. Tracey*, 221 Mich. App. 321, 329; 561 .W. 2d 133 (1997)("the relevant issue is whether a defendant consented to the discontinuance of the trial, rather than whether he formally consented to the declaration of a mistrial"). The Court of Appeals below correctly found there was no consent to the trial court's declaration of a mistrial.

Where a defendant clearly indicates a refusal to continue the trial, "but refuses to acquiesce to a mistrial, the defendant can be said to have "consented to discontinuance of the trial by expressly objecting to its continuance"". *Echavarria*, 233 Mich. App. at 364-365, quoting *Tracey*, 221 Mich. App. at 327. Such "implied consent" may only be found "where the **circumstances positively indicate** a defendant's willingness to acquiesce in the [mistrial] order". *Glover v. McMackin*, 950 F. 2d 1236, 1240 (6th Cir. 1991)(emphasis supplied), quoting *Jones v. Hogg*, 732 F. 2d 53, 57 (6th Cir. 1984); ("In the context of **clear evidence demonstrating** that defendant elected to forego his right to continue the trial by **unequivocally consenting to its discontinuation** ...the prohibition against double jeopardy does not bar retrial ...", *Tracey*, 221 Mich. App. at 329) (emphasis supplied).

The *Gantley* Court found such implied consent "in light of all the circumstances surrounding" the declaration of mistrial; Gantley mentioned pretrial polygraph results despite the trial court having twice previously cautioned him against it. The *Gantley* Court also found that (1) defense counsel suggested to the trial court that the trial court's own statements, made in strong response to Gantley's, caused incurable prejudice; (2) the trial court considered the possibility of viable alternatives to mistrial; (3) the trial court decided no viable alternative existed; and (4) the trial court invited response from defense counsel by asking, prior to the mistrial declaration, if there were "anything else" to address. *Gantley*, 172 F. 3d at 429. The *Gantley* Court further found that although the trial judge immediately expressed the intention to declare a mistrial, it reconsidered that decision after discussing alternatives; additionally, the reviewing court found such "a high degree of necessity for declaring a mistrial"-- and that the trial judge had only declared the mistrial after considering whether there were other "less severe alternatives"-- that mistrial was warranted. *Gantley*, 172 F. 3d at 431. Such a "high degree of necessity" defines "manifest necessity" so as to allow retrial following mistrial. *Washington*, 434 U.S. at 506; *Glover*, 950 F. 2d at 1240; *Gantley*, 172 F. 3d at 429; *Jones v. Hogg*, 732 F. 2d at 55. Of course, where there is manifest necessity for a mistrial, there is no need for consent, whether express or implied. *Dawson*, 431 Mich. at 252-253; *Mehall*, 454 Mich. at 4; *Perez*, 22 U.S. at 580; *Dinitz*, 424 U.S. at 607; *Lett*, 466 Mich. at 229 (CAVANAGH, J., dissenting); *Johnson*, 396 Mich. 433-434.

Such a stringent standard for protecting a defendant's Fifth Amendment double jeopardy protection and Sixth Amendment jury trial right, is consistent with other constitutional protections; for example, mere acquiescence to apparent lawful authority, and the duress and coercive effect inherent in such authority, will not alone support a finding of valid consent to a search and thus a waiver of Fourth Amendment protections. *People v. Farrow*, 461 Mich. 202; 600 N.W. 2d 634 (1999); *People v. Borchard-Ruhland*, 460 Mich. 278; 597 N.W. 2d 1 (1999). However, waiver of double jeopardy protections need not meet the knowing, voluntary, and intelligent requirements of other constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458; 58 S. Ct. 1019; 82 L. Ed. 1461 (1938); *Jorn*, 400 U.S. at 484-485, n. 11; *Olano*, 507 U.S. 733; *People v. Hicks*, 447 Mich. 819, 860; 528 N.W. 2d 136 (1994)(BOYLE, J., dissenting).

There is, in any event, no real question of consent if the defendant is not given a proper opportunity to object. *Jorn*, 400 U.S. at 487. Defense counsel in the instant case was not given a proper opportunity to meaningfully object, or to seek alternatives to the trial court's sua sponte declaration. Compare, for example, *Love v. Morton*, 944 F. Supp. 379 (1996), affirmed 112 F. 3d. 131 (3rd Cir. 1997), wherein the trial court admittedly did not seek or allow input from the attorneys; the court, for personal family reasons, declared a mistrial and absented himself from the case; the reviewing court found no manifest necessity and no consent to the mistrial, and retrial was properly barred on double jeopardy grounds.

The record reveals that the jury entered the courtroom at 11:59 AM; the jurors likely took a few moments to get situated, then the process of announcing the verdict, commencing the polling, noticing the extra juror, and conducting a sidebar conference, followed, and were **all completed within three minutes**, as the record shows the jury left the courtroom at 12:02 PM (43a - 45a) Obviously, the unrecorded sidebar contained no substantive discussion of alternatives to mistrial; rather, it is reasonable to conclude that **within those few seconds**, counsel was then advised by the trial court that a mistrial would be declared. The record supports such a conclusion; the next morning, when the trial court asked the attorneys about their recollection of the sidebar conference, the prosecutor responded that the court indicated that the 13 jurors would result in a mistrial (69a) There was no debate, nor any real opportunity for debate, prior to the trial court's sua sponte declaration. Had the trial court taken a recess to allow research and argument, defense counsel's response would have been clear, and the issue of consent, express or implied, or non-consent would be in the record. As the record stands, however, there is nothing from which this Honorable Court can reasonably find that defense counsel consented to the mistrial. Neither attorney gave any substantive response to the trial court's declaration (69a). The trial court's failure to order a recess to allow an opportunity to properly consider and resolve both the issue and its ramifications, shows the suddenness with which the sua sponte mistrial was declared, and reflects the trial court's complete failure to satisfy the obligation to exercise the

'sound discretion' required for it to "shoulder its *Perez* burden through "that degree of careful consideration and solicitude for the serious consequences attendant upon mistrials". *McMackin*, 198 F. 3d at 595. It must be stressed that the prosecutor failed to expressly affirm or object to the trial court's sua sponte declaration of a mistrial, but admitted to trusting the trial court's ruling (69a. It surely would be a skewed result for this Court to find that the prosecutor's acquiescence in the trial court's erroneous declaration of a mistrial -- issued without manifest necessity and without an effective opportunity to research the law or consider and suggest alternatives -- should warrant depriving Mr. McGee of his constitutional double jeopardy protections, and thereby giving to the prosecutor the added benefit of a second day in court -- a so-called second bite at the apple.

There was no manifest necessity for a mistrial, and there was no consent to the mistrial. Accordingly, the trial court abused its discretion.

ARGUMENT

II. THE TRIAL COURT'S RECALLING AND REPOLLING OF THE JURORS WAS STRUCTURAL ERROR, NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

A. Standard of Review

As indicated above in **Argument I**, the trial court's mistrial decision is reviewed for an abuse of discretion. *Blackburn*, 94 Mich. App. 711; *Stevens*, 177 F. 3d. at 583. However, structural constitutional error is subject to automatic reversal; a non-structural constitutional error, where preserved, is subject to the harmless beyond a reasonable doubt analysis. *People v. Duncan*, 462 Mich. 47, 50-51; 610 N.W. 2d 551 (2000); *People v. Anderson (After Remand)*,. 446 Mich. 392, 404-405; 521 N.W. 2d 538 (1994); FRCP 52(a). Forfeited error, constitutional or nonconstitutional, is subject to the "plain-error" analysis. *Olano*, 507 U.S. at 734; *People v. Allen*, 466 Mich. 86, 89-90; 643 N.W. 2d 227 (2002); *People v. Carines*, 460 Mich. 750; 597 N.W. 2d 130 (1999); FRCP 52(b).

B. Analysis

MCR 6.420(C) is not discretionary upon trial courts when a timely request is made. The Rule provides in relevant part:

> (C) Poll of Jury. **Before the jury is discharged**, the court on its own initiative may, or on the motion of a party **must**, have each juror polled in open court as to whether the verdict announced is that juror's verdict (emphasis supplied).

The trial court failed to properly poll the jury prior to its being discharged; instead, the trial court discharged the jury, then erroneously demanded its return eight days later for polling. It may be argued that there is no evidence of any outside influence actually having had an effect upon the jurors following their discharge from service. One case where that was done is distinguishable from the instant case. In *State v. Coulthard*, 492 N.W. 2d 329 (1992), the Wisconsin Supreme Court found harmless a recalling of the jury fifty-one days after the initial verdict; the trial court had initially received the guilty verdict, then received a collective indication (show of hands) reflecting a verification from the jurors. The trial court refused any additional individual polling, and the jury was discharged. Subsequently, the trial court determined that it had erred, considered a new trial, then (as in the instant case) determined the jurors would be returned for polling. When the jurors returned, the trial court reaffirmed the accuracy of their initial pronouncement, previously-accepted by the court. The reviewing court applied a harmless error analysis, and concluded that despite the seriousness of the trial court's initial error (i.e., preventing an immediate individual polling), the curative action was "such that no reasonable possibility exists that one or more jurors not only falsely responded to the collective poll but also to the individual poll". *Coulthard*, 492, N.W. 2d at 583. The *Coulthard* court reviewed the obligation to poll the jury as a common law procedure; there was apparently no applicable court rule or other mandatory requirement analogous to MCR 6.420(C). Michigan has such a **mandatory** provision. Additionally,

the *Coulthard* jury was nevertheless essentially polled and the verdict was accepted by the trial court. There was thus a polling and a completed verdict, in contrast to the instant case, where the jury was not timely polled, and the verdict was not accepted by the court prior to the jury being discharged. Once the jury was discharged in the instant case, its "legal duties ceas[ed] to exist; it no longer function[ed] as a unit charged to perform a solemn task but rather as 12 unsworn members of the community; its relationship to the case [had] terminated". *People v. Rushin*, 37 Mich. App. 391, 398-399; 194 N.W. 2d 718 (1971). Mr. McGee properly and timely requested a polling of the jury. A polling of the jury is mandatory upon trial courts when a timely motion is made. MCR 6.420(C). A defendant simply cannot otherwise establish that the verdict is unanimous and fashioned from the individual judgments of the individual jurors.

In the instant case no valid verdict was entered. A verdict is final when announced in open court, assented to by the jury-- through polling if timely requested -- and accepted by the trial court. *People v. Sanders*, 58 Mich. App. 512, 516-517; 228 N.W. 2d 439 (1975); MCR 6.420(A). The trial court below, without examining reasonable alternatives, and without manifest necessity, discharged Mr. McGee's jury. It is not the proper or appropriate role of the prosecutor, or of this Honorable Court, to guess at, or try to complete any possible verdict of the jury. Were that done, then a unanimous jury is not the entity finding guilt beyond a reasonable doubt. The right to have the jury

determine guilt is fundamental. *Duncan v. Louisiana*, 391 U.S. 145, 149; 88 S. Ct. 1444; 20 L. Ed. 2d 491 (1968); *Fulminante*, 499 U.S. at 310; *Sullivan v. Louisiana*, 508 U.S. 275, 282-283; 113 S. Ct. 2078; 124 L. Ed. 2d 182 (1993)(where an erroneous reasonable doubt instruction was held to be structural error); *Allen*, 466 Mich. at 90. Harmless error analysis does not apply where an entity other than the jury has the ultimate responsibility of ascertaining guilt or non-guilt. *Sullivan*, 508 U.S. at 281. "Harmless error review is unavailable where the wrong entity judged the defendant guilty", and an "[e]rror is not subject to harmless error review if it vitiates all the jury's findings." *People v. Duncan,* 462 Mich. at 67, and 65 (CORRIGAN, J., dissenting).

In *People v. Duncan*, a case which involved a trial court's complete failure to instruct the jury on felony firearm elements; this Court held, as a "bright line" rule, that: "It is structural error requiring automatic reversal to allow a jury to deliberate a criminal charge where there is a complete failure to instruct the jury regarding any of the elements necessary to determine if the prosecution has proven the charge beyond a reasonable doubt." 462 Mich. at 48. The danger is that the jury is being directed to a verdict, and a defendant denied the proper consideration, and finality of a well-deliberated determination by a unanimous panel. A court, or prosecutor, or other entity simply cannot step into the jury-role constitutionally guaranteed for a criminally accused; the "court cannot, no matter how clear the defendant's culpability, direct a guilty verdict." *Neder v. United States*, 527 U.S. 1, 33; 119 S. Ct. 1827; 144 L. Ed. 2d 35

(1999)(SCALIA, J, dissenting, in part); *Harmon v. Marshall*, 69 F. 3d 963, 966 (C.A. 9, 1995)("No matter how clear evidence may be, the Sixth Amendment requires that the jury, not the judge, must find the facts necessary to decide the elements of a crime...").

In the *Sullivan* case, the United States Supreme Court held that "in the case of a constitutionally deficient reasonable-doubt instruction, "the entire premise of *Chapman* [2] [harmless error] review is simply absent." *Sullivan*, 508 U.S. at 283 (REHNQUIST, C.J., concurring). Chief Justice Rehnquist further noted that "[w]here the jury views the evidence from the lens of a defective reasonable-doubt instruction, the court reasons, there can be *no* factual findings made by the jury beyond a reasonable doubt in which an appellate court can ground its harmless-error analysis." 508 U.S. at 283 (emphasis in original).

There simply was no timely, proper and reliable verdict in the instant case. Instead, there was an invalid, although surely well-intentioned, attempt to establish a verdict. However, such creative but illegal efforts -- in derogation of the defendant's constitutional protections -- cannot lead to or promote a sound judicial system. The opportunity for the jury to complete the verdict was taken from the parties through the trial court's sua sponte declaration of mistrial. The was no verdict entered -- and never now could be -- from which this Court might undertake a *Chapman* harmless-error analysis. As noted in Sullivan "[h]armless-error review looks, we have said, to the basis

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[2]*Chapman v. California*, 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967).

on which "the jury *actually rested* its verdict." 508 U.S. at 279 (citations omitted; emphasis in original). The *Sullivan* Court continued as follows:

> "Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate." 508 U.S. at 280 (emphasis in original).

"The very premise of structural-error review is that even convictions reflecting the "right" result are reversed for the sake of protecting a basic right." *Neder*, 527 U.S. at 34 (SCALIA, J., dissenting, in part). Additionally, "...to hypothesize a guilty verdict that was never in fact rendered --no matter how inescapable the findings to support that verdict might be--would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 279.

A harmless error analysis is simply inapplicable to such fundamental errors as committed by the Trial Court in the instant case. See *Olano*, 507 U.S. at 735; *Sullivan*, 508 U.S. 281 ("Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort [i.e., structural]...The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."" *Sullivan*, 508 U.S. at 281-282.

Recognizing the fundamental nature of the polling issue, the majority of other states

have considered, and rejected, a harmless-error analysis. For example, in *State v. Pare*, 755 A. 2d 180, 253 Conn. 611 (2000)(wherein the trial judge had refused to poll the jury after the jury had been "discharged" but sent to the jury room to await the judge; the jury was still present such that the request for polling was timely) the court rejected a harmless error analysis for a polling request denial, siding with a majority of the jurisdictions, and noting that the courts have "largely dispensed with an evaluation of harm, opting instead to require reversal regardless of whether the defendant was prejudiced by the trial court's failure to conduct a timely poll" (*Pare*, 755 A. 2d at 637) [the court cited a number of decisions: *United States v. Marinari*, 32 F. 3d 1209, 1215 (7th Cir. 1994)("error per se for the district court not to recall the jury and conduct an oral poll"); *United States v. F. J. Vollmer & Co.*, 1 F. 3d 1511, 1522 (7th Cir. 1993)("per se error requiring reversal"); *United States v. Hiland*, 909 F. 2d 1114 (8th Cir. 1990)("reversible error"); *Government of the Virgin Islands v. Hercules*, 875 F. 2d 414, 419 (3d Cir. 1989)("per se error requiring reversal"); *Rinker v. State*, 228 Ga. App. 767; 492 S.E. 2d 746 (1997)("the right to poll the jury is not discretionary ...reversible error"); *Commonwealth v. Downey*, 557 Pa. 154; 732 A. 2d 593 (1999); *State v. Pockert*, 49 Wash. App. 859, 862; 746 P. 2d 839 (1987)("the right to have each juror individually state his or her verdict in his presence is essential to a criminal defendant's constitutional right to a unanimous verdict", and [is] "a denial of a right so fundamental as to require a retrial"); *State v. Behnke*, 155 Wis. 2d 796, 801; 456 N.W. 2d 610 (1990)(the right to

poll the jury is a "corollary to the defendant's right to a unanimous verdict").

In the instant case no valid verdict was entered. A verdict is final when announced in open court, assented to by the jury-- through polling if timely requested -- and accepted by the trial court. *People v. Sanders*, 58 Mich. App. 512, 516-517; 228 N.W. 2d 439 (1975); MCR 6.420(A). The trial court below, without examining reasonable alternatives, and without manifest necessity, discharged Mr. McGee's jury. We cannot properly speculate upon the result of a poll not taken; we have "no way of predicting the result of a poll not taken". *Pare*, 755 A. 2d at 196, FN 13

Any effort to apply a harmless error analysis to this case would, in any event, necessarily be error affecting the "fairness, integrity [and] public reputation of [the] judicial proceedings" necessitating reversal, *United States v. Young*, 470 U.S. 1, 15; 105 S Ct. 1038; 84 L Ed. 2d 1 (1985), quoting *United States v. Atkinson*, 297 U.S. 157, 160; 56 S Ct. 391; 80 L. Ed. 555 (1936), regardless of the defendant's innocence. *Olano*, 507 U.S. at 736-737; *Fulminante*. The convictions were properly reversed. The case must then be barred from retrial due to Mr. McGee's double jeopardy protections.

ARGUMENT

III. MR. MCGEE'S DOUBLE JEOPARDY PROTECTIONS ARE IMPLICATED IN THIS CASE, AND A HARMLESS-ERROR ANALYSIS IS NOT APPLICABLE; RETRIAL IS BARRED.

A. Standard of Review

As indicated above in **Arguments I and II**, the trial court's mistrial decision is reviewed for an abuse of discretion. *Blackburn*, 94 Mich. App. 711; *Stevens*, 177 F. 3d. at 583. Additionally, constitutional issues are questions of law reviewed **de novo**. *People v. Herron*, 464 Mich. 593, 599; 628 N.W. 2d 528 (2001). However, structural constitutional error is subject to automatic reversal; a non-structural constitutional error, where preserved, is subject to the harmless beyond a reasonable doubt analysis. *People v. Duncan*, 462 Mich. at 50-51; *Anderson (After Remand)*,. 446 Mich. at 404-405; FRCP 52(a). Forfeited error, constitutional or nonconstitutional, is subject to the "plain-error" analysis. *Olano*, 507 U.S. at 734; *Allen*, 466 Mich. at 89-90; *Carines*, supra; FRCP 52(b).

B. Analysis

The resolution of the double jeopardy issue is dependent upon the Court's resolution of the two other issues; if this Court finds the trial court committed error, but there was manifest necessity or consent, then retrial would not be barred by double jeopardy. However, in the absence of manifest necessity or consent, retrial is barred. It really is that simple.

The protections afforded a defendant by the Double Jeopardy Clause include the defendant's "valued right" right to have his case completed by the particular tribunal first impaneled to try him. *Wade v. Hunter*, 336 U.S. 684, 689; 69 S Ct. 834; 93 L. Ed. 974 (1949); *Oregon v. Kennedy*, 456 U.S. 667, 673; 102 S. Ct. 2083; 72 L. Ed. 2d 416 (1982); *Watkins v. Kassulke*, 90 F. 3d 138, 141 (6th Cir. 1996)("prosecution of a defendant before a jury other than the original jury, excluding any contemporaneously empaneled and sworn alternates, is barred"); *People v. Henry*, 248 Mich. App. 313, 318; 639 N.W. 2d 285 (2001), citing *People v. Dry Land Marina, Inc.*, 175 Mich. App. 322, 325; 437 N.W. 2d 391 (1989)(the defendant has "a constitutional right to have his case completed and decided by that tribunal"). The double jeopardy protections also guard against the incurred expense and emotional stress associated with an unresolved accusation of wrongdoing", *Jones v. Hogg*, 732 F. 2d at 57, citing *Washington*, 434 U.S. at 503-504, and the "embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity". *Dinitz*, 424 U.S. at 606, quoting *Green v. United States*, 355 U.S. 184, 187; 78 S. Ct. 221; 2 L. Ed. 2d 199 (1957). The protections reflect "a constitutional policy of finality **for the defendant's benefit** in all criminal proceedings, and is "fundamental to the American scheme of justice"". *Jones v. Hogg*, 732 F. 2d. at 54, quoting *Jorn*, 400 U.S. at 479 (emphasis supplied).

Mr. McGee had his jury taken from him without proper justification; the prosecutor wants to try him again. This is exactly the kind of harm the double jeopardy protections

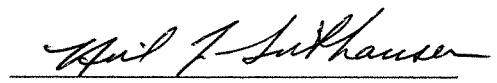
protect against. Retrial is permissible following a mistrial declaration where there is consent or manifest necessity for the mistrial. *Echavarria*, 233 Mich. App. at 363; *Mehall*, 454 Mich. at 4. There was neither consent nor manifest necessity in the instant case. This Court would have to fashion a new, heretofore unrecognized exception to the time-honored protections of double jeopardy in order to circumvent the constitutional protections guaranteed to Mr. McGee. Surely that is not the Court's true role or intent.

A harmless error is inapplicable to these errors, which span -- and deprive Mr. McGee of the guaranteed protections found in -- both the Fifth and Sixth Amendments as well as the Michigan Constitution. Michigan Const. 1963, art. 1, section 15; see, also, *Price v. Georgia*, 398 U.S. 323, 331; 90 S. Ct. 1757; 26 L. Ed. 2d 300 (1970). This was a structural error, even more literally obvious than that presented in *Sullivan*. Not only was there "no jury verdict within the meaning of the Sixth Amendment", there was no verdict. Mr. McGee manifestly was denied his right to a jury, through to a completed verdict, absent manifest necessity for preventing the verdict. "The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."" *Sullivan*, 508 U.S. at 281-282.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellant William C. McGee prays this Honorable Court will affirm the Court of Appeals' reversal of his convictions, but reverse the Court of Appeals' remand, bar retrial, and order the cause dismissed.

Respectfully submitted,



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